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95632-4

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JOHN DOUGLAS MAYFIELD, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF COWLITZ COUNTY

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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## I. ISSUES PRESENTED

1. Whether the Court of Appeals erred in declining to address the defendant's article I, section 7 claim in the absence of a *Gunwall* analysis, where this Court has previously declined to address the same issue where inadequate *Gunwall* briefing was provided?
2. Whether the federal attenuation doctrine conflicts with article I, section 7?
3. Whether *Ferrier* warnings may attenuate a consent search from a prior illegal detention?

## II. STATEMENT OF THE CASE

The facts of this case are set forth in the Court of Appeals' unpublished opinion in *State v. Mayfield*, No. 48800-1-II, 2018 WL 286810. In short, Cowlitz County Deputy Nunes was dispatched to a report of a suspicious vehicle blocking a driveway. He spoke with the property owner, who informed him the driver had been asleep, was difficult to rouse and ultimately had fled. Defendant Mayfield returned to the location shortly thereafter, and appeared to attempt to avoid the officer, but was contacted and asked about the vehicle. Nunes determined Mayfield to be the registered owner, and dispatch informed Nunes that Mayfield was supervised by the Department of Corrections and had prior drug related law enforcement contacts. During the contact, a second officer arrived. Nunes, who was suspicious of the situation, but could not express that he suspected Mayfield of any specific crime, asked Mayfield about his drug use, and whether he

had any drugs on his person. Mayfield denied that he did, and Nunes asked him for consent to search his person, advising Mayfield that he need not consent. Mayfield permitted the search, and Nunes found three separate wads of cash, totaling \$464; Nunes found the manner in which the money was kept consistent with his experience in investigating drug crimes. Nunes returned the money to Mayfield. Because of all of the circumstances involved, Nunes asked Mayfield for consent to search his vehicle, advising him of his right to refuse consent, revoke consent, or limit the scope of his consent – *Ferrier*<sup>1</sup> warnings. Mayfield understood the warnings, expressed no confusion, and permitted the search; Mayfield watched as the search progressed and, at no time limited or revoked consent. In Mayfield’s vehicle, Nunes found methamphetamine and plastic baggies consistent with those used to package illegal drugs, some of which contained methamphetamine residue.

Before trial, the defendant moved to suppress the evidence obtained during the contact,<sup>2</sup> claiming Mayfield’s consent to search was vitiated by

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<sup>1</sup> *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

<sup>2</sup> The Court of Appeals characterized the CrR 3.6 motion as moving to suppress “any and all evidence discovered as a result of the search of Mayfield’s vehicle.” The motion, itself, requested suppression of the fruits of both searches – that of the defendant, and that of his vehicle, based upon his unlawful detention. CP 12-13.

an unlawful detention. CP 12. The Court of Appeals' majority decision analyzed the issue based on the Fourth Amendment's exclusionary rule and its attenuation doctrine, reasoning that defendant had not presented a proper *Gunwall*<sup>3</sup> analysis which explained why the Court should resort to independent state constitutional grounds. *Mayfield* at \*2-4. The dissenting judge found that a *Gunwall* analysis was unnecessary, and would have analyzed the issue under the Washington State Constitution, but did not undertake the analysis in his dissent. *Id.* at \*5-7 (Bjorgen, J. dissenting).

### III. ARGUMENT

#### A. A COURT MAY DECLINE TO REVIEW A CLAIM BASED UPON INDEPENDENT STATE CONSTITUTIONAL GROUNDS IN THE ABSENCE OF PROPER *GUNWALL* BRIEFING.

For over thirty years, this Court has regularly held that the criteria set forth in *Gunwall* must be addressed before it is appropriate to conduct an independent state constitutional analysis. *See State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999). Only when these criteria weigh in favor of independent constitutional interpretation does a court have a principled basis for departing from federal precedent. *Gunwall*, 106 Wn.2d at 59-63. The factors considered are “(1) the textual language, (2) differences in the texts; (3) constitutional history; (4) preexisting state

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<sup>3</sup> *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

law; (5) structural differences; and (6) matters of particular state or local concern.” *Id.* at 58.

Once this Court has conducted a *Gunwall* analysis and has determined that a provision of the state constitution independently applies to a *specific* legal issue, it is unnecessary to repeat the analysis in subsequent cases presenting the *same* issue. *Ladson*, 138 Wn.2d at 348; *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). That is not to say, however, that in all cases involving the *same constitutional provision*, it is unnecessary to undertake a subsequent *Gunwall* analysis once it has been conducted. In the context of article I, section 7, however, this analysis may be limited to the fourth and sixth *Gunwall* factors. *See State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998) (“Because this court is examining the same constitutional provision that was at issue in *Gunwall*, we merely adopt the analysis of factors one, two, three, and five that we undertook there”).

While the state constitution may have been held to provide broader protection in one context, that holding does not necessitate it to provide broader protection in all contexts. *See e.g., State v. Vanhollenbeke*, 190 Wn.2d 315, 412 P.3d 1274 (2017) (acknowledging that the parties had conducted a full *Gunwall* analysis on third-party consent to search, but adhering to earlier jurisprudence that the issue is analyzed under the Fourth Amendment); *but see Blomstrom v. Tripp*, 189 Wn.2d 379, 400-02,

402 P.3d 831 (2017) (concluding *Gunwall* analysis regarding protection of bodily functions supported separate analysis under article I, section 7).

Notably, this Court has specifically declined to address the *precise issue* presented here, whether the federal attenuation doctrine is inconsistent with article I, section 7, where the parties have failed to provide adequate *Gunwall* briefing. *State v. Ibarra-Cisneros*, 172 Wn.2d 880, 263 P.3d 591 (2011); *State v. Armenta*, 134 Wn.2d 1, 948 P.2d 1280 (1997). In *Ibarra-Cisneros*, this Court declined the invitation to review the potential article I, section 7 conflict in the absence of proper *Gunwall* briefing, notwithstanding its earlier decision in *State v. Eserjose*, 171 Wn.2d 907, 259 P.3d 172 (2011), which presented the same issue, and in which *Gunwall* was briefed.

While the failure of a party to sufficiently brief an issue *could* preclude review, this Court has recognized it is not constrained by the issues as framed by the parties, having the inherent authority to reach issues not adequately briefed if those issues are necessary for decision; it also has the authority to review issues not reviewed by the Court of Appeals. *See City of Seattle v. McCready*, 123 Wn.2d 260, 868 P.2d 134 (1994); *see also, State v. Bustamante-Davila*, 138 Wn.2d 964, 983 P.2d 590 (1999) (although Court of Appeals did not address an issue due to inadequate briefing, defendant briefed the issue in petition for review; therefore, the issue was

properly before this Court). Thus, even in the absence of *Gunwall* briefing, the Court may, but need not, engage in an independent state constitutional analysis.

The Court of Appeals did not err in declining to review defendant's claim that the federal attenuation doctrine conflicts with article I, section 7. Defendant acknowledged that he had not asked the trial court to grapple with this issue.<sup>4</sup> Br. at 22 ("Trial counsel did not specifically argue the federal attenuation doctrine was incompatible with article 1, section 7... However, courts review unlawful searches for the first time on appeal because they are manifest constitutional errors").<sup>5</sup>

On appeal, defendant improvidently relied on *State v. Chenoweth*, 160 Wn.2d 454, 463, 158 P.3d 595 (2007), assuming a *Gunwall* analysis was unnecessary. Yet, because this Court had *twice* declined to review this

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<sup>4</sup>Mayfield's trial brief in support of suppression assumed the applicability of the federal attenuation doctrine, and made no attempt to argue that article I, section 7 is incompatible with the federal attenuation doctrine. CP 9.

<sup>5</sup> The failure to raise an issue in the trial court precludes appellate review unless the trial court committed a manifest error affecting a constitutional right. RAP 2.5(a)(3). In order for an error to be "manifest," thus, warranting review, the error must be "so obvious on the record" that it could have been foreseen by the trial court. *State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). An issue cannot be "manifest," obvious, or foreseeable error where a plurality of this Court had previously agreed that the issue does not violate article I, section 7. *Eserjose*, 171 Wn.2d 907.

precise issue based on inadequate *Gunwall* briefing in both *Armenta* and, most recently, in *Ibarra-Cisneros*, a case post-dating *Chenoweth*, Mayfield should have provided a complete *Gunwall* analysis to the Court of Appeals.

**B. THE ATTENUATION DOCTRINE DOES NOT OFFEND ANY STATE CONSTITUTIONAL PROVISION. HOWEVER, THE MANNER IN WHICH WASHINGTON TRIAL COURTS APPLY THE DOCTRINE MAY RAISE SEPARATE STATE CONSTITUTIONAL CONCERNS.**

Attenuation analysis presents itself in many forms. It may arise in Fourth Amendment/article I, section 7 cases; in Fifth Amendment/article 1, section 22 cases; or in Sixth Amendment/article 1, section 22 cases, or in cases involving two or more distinct constitutional provisions. Where a search allegedly violates article I, section 7 or the Fourth Amendment, potential derivatives of that search may include physical evidence, as in this case; a confession, as in *Eserjose*; or a witness or victim’s identity, as in *State v. Smith*, 177 Wn.2d 533, 303 P.3d 1047 (2013). The fact that attenuation analysis presents itself in many forms and must be determined on the facts of each case<sup>6</sup> are both reasons this Court should not categorically prohibit its application under our Constitution. Although a *Gunwall* analysis likely provides a principled basis<sup>7</sup> for review of the

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<sup>6</sup> *Brown v. Illinois*, 422 U.S. 590, 603, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (“The question ... must be answered on the facts of each case”).

<sup>7</sup> The State agrees that a *Gunwall* analysis likely favors review of the attenuation doctrine under article I, section 7. Regarding the fourth *Gunwall*

attenuation doctrine based upon independent state constitutional grounds, such an analysis does not result in the inexorable conclusion that the federal attenuation doctrine necessarily conflicts with article I, section 7. Rather, as explained below, it is the improper application of the doctrine that may create conflict with article I, section 7.

1. The basic premise of the attenuation doctrine does not offend article I, section 7.

The federal attenuation doctrine is a recognized exception to the exclusionary rule of *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). *Wong Sun* recognized that an illegal governmental action does not necessarily taint all subsequently discovered evidence,

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factor, preexisting state law, Washington first adhered to the common law rule of non-exclusion – evidentiary suppression was not a remedy. *See State v. Royce*, 38 Wash. 11, 80 P. 268 (1905). Washington recognized exclusion as a remedy in 1922. *State v. Gibbons*, 118 Wash. 171, 203 P. 390 (1922) (citing *Amos v. United States*, 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654 (1921)). Thus, for a time, Washington’s rule paralleled its federal counterpart. However, two decades after the Supreme Court held that the exclusionary rule applied to the states via the Fourteenth Amendment, in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), this Court distinguished Washington’s exclusionary rule from its federal counterpart, holding that Washington’s right to privacy under article I, section 7 must not be “diminished by the judicial gloss of a selectively applied exclusionary remedy.” *State v. White*, 97 Wn.2d 92, 640 P.2d 1061 (1982). The sixth *Gunwall* factor likely weighs in favor of review upon independent state constitutional grounds because article I, section 7’s exclusionary rule emphasizes the protection of personal rights, rather than “curbing governmental actions,” a matter of state concern. *White*, 97 Wn.2d at 110.

where that evidence is not a “fruit” of the original illegality. If an illegality has no effect on or does not produce concomitant evidence, then article I, section 7 cannot be offended by the use of subsequently obtained evidence which is unrelated to the illegality. At the heart of an attenuation inquiry is whether the subsequently obtained evidence in question was, in fact, a “fruit” or product of the original illegality, or whether it’s source was “an intervening independent act of a free will,” sufficient “to purge<sup>8</sup> the primary taint of the unlawful invasion.” *Wong Sun*, 371 U.S. at 487-88.

Attenuation analysis does not focus on whether the evidence would have been procured “but-for” the illegality, but rather, whether its procurement was a product of police exploitation of the illegality. *Id.*; *United States v. Ceccolini*, 435 U.S. 268, 274, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978) (citing *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939)). As LaFave has noted, “there seemed to be no doubt that [Wong Sun] would never have come in and confessed *but for* the prior [unlawful] arrest,” and yet, because police did not exploit that illegality and Wong Sun’s confession was an “independent act of free will,”

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<sup>8</sup> The importance of the terms used by the United States Supreme Court cannot be understated. Federal courts use the terms “dissipate the taint” or “purge the taint.” Dissipate and purge do not mean “diminish” or “reduce.” Rather, dissipate means “to break up and vanish.” Merriam-Webster’s Dictionary and Thesaurus 233 (2007). “Purge” means “to cleanse or purify esp. from sin; to get rid of.” *Id.* at 651.

it was untainted by the unlawful arrest. *See* Wayne R. LaFare, 6 *Search and Seizure*, § 11.4(a) at 326 (5<sup>th</sup> ed. 2012) (emphasis added).

Because attenuation analysis inquires whether the product of unlawful police conduct is a “tainted fruit,” or whether, because of time or circumstances it is not a “fruit” at all or has been “cleansed” of any taint, the doctrine itself does not inherently conflict with article 1, section 7. *See State v. Gaines*, 154 Wn.2d 711, 116 P.3d 993 (2005) (explicitly adopting independent source doctrine under article I, section 7 stating, “evidence tainted by unlawful government action is not subject to suppression under the exclusionary rule, provided that it is ultimately obtained pursuant to a valid warrant or other *lawful means independent of the unlawful action.*” (emphasis added)).

2. Washington State’s exclusionary rule is concerned with privacy considerations as well as those considerations underlying the federal exclusionary rule.

The federal exclusionary rule protects federal constitutional guarantees in two respects – to protect Fourth Amendment guarantees as a prophylactic rule aimed at “detering lawless conduct by federal officers” and a rule promoting judicial integrity by “closing the doors of the federal courts to any use of evidence unconstitutionally obtained.” *Brown*, 422 U.S. 590. However, the deterrence function of the federal exclusionary rule is not served by suppression of evidence where the connection between

the illegality and that evidence is attenuated. As one commentator has observed:

As [the exclusionary rule] serves [its deterrence] function, the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter the constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest [of convicting the guilty].

LaFave, *6 Search and Seizure*, § 11.4(a) at 327 (quoting Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U.Pa.L.Rev, 378, 389 (1964)).

In serving its deterrence function, federal attenuation analysis considers (1) the temporal proximity of the illegality and the recovery of the evidence; (2) the presence of intervening circumstances,<sup>9</sup> and (3) the purpose and flagrancy of the official misconduct. *Id.* at 603-04.

In Washington State, article I, section 7's exclusionary rule qualitatively differs from the rule applied under the Fourth Amendment.

In contrast [to its federal counterpart], the state exclusionary rule is constitutionally mandated, exists primarily to vindicate personal

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<sup>9</sup> See, e.g., *Wong Sun*, 371 U.S. at 491 (defendant released on own recognizance between arrest and confession); *United States v. Owen*, 492 F.2d 1100 (5th Cir. 1974) (defendant released on bail, returned voluntarily to give statement); *Commonwealth ex rel. Craig v. Maroney*, 348 F.2d 22 (3d Cir. 1965) (defendant spoke with attorney before confession).

privacy rights, and strictly requires the exclusion of evidence *obtained by* unlawful government intrusions.

*Ibarra-Cisneros*, 172 Wn.2d at 889 (quoting *Chenoweth*, 160 Wn.2d at 472 n.14) (Madsen, J. dissenting) (emphasis added).

While Washington State’s exclusionary rule exists “primarily to vindicate personal privacy rights,” it also is concerned with deterring unlawful police conduct and maintaining the integrity of the judiciary. *See State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010) (“Thus, while our state’s exclusionary rule also aims to deter unlawful police action, its paramount concern is protecting an individual’s right of privacy”). Although suppression generally follows from an illegal search or seizure, it only applies to evidence “obtained by [the] unlawful government[] intrusion[.]” *Ibarra-Cisneros*, 172 Wn.2d at 889. This would strongly suggest that if the evidence is obtained not by law enforcement’s exploitation of the unlawful intrusion, but rather, by an independent act of a free will, suppression is not required.

3. This Court has recognized the independent source doctrine, an exception to the exclusionary rule that is related to the attenuation doctrine.

The exclusionary rule, independent source doctrine, and the attenuation doctrine are inter-related principles. As Justice Felix Frankfurter said,

Here ... the facts improperly obtained do not “become sacred and inadmissible. If knowledge of them is gained from an *independent*

*source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it" simply because it is used derivatively...*

In practice, this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wiretapping and the Government's proof. As a matter of good sense, however, *such connection may have become so attenuated as to dissipate the taint.*

*Nardone*, 308 U.S. at 341 (emphasis added).

Thus, independent source analysis and attenuation analysis both inquire whether the illegality and the evidence are, in fact, causally related, and the exclusionary rule requires that evidence which *is* causally related to the illegality to be suppressed. Independent source analysis inquires whether evidence tainted by an unlawful government action has ultimately been procured pursuant to a valid warrant or other lawful means independent of the illegality. *Gaines*, 154 Wn.2d at 718. In *Gaines*, this Court expressly determined that the independent source doctrine, unlike the inevitable discovery doctrine, does not conflict with article 1, section 7. Like the independent source doctrine, the attenuation doctrine looks at the facts presented and inquires whether evidence procured after an illegality was a product of an exploitation of that illegality, or if it was based upon an "*independent act of a free will.*"

The attenuation doctrine is unlike the speculative inevitable discovery doctrine, which was rejected by this Court in *State v. Winterstein*,

167 Wn.2d 620, 220 P.3d 1126 (2009). The inevitable discovery doctrine ignores the fact that an illegality occurred and the evidence obtained was a product of that illegality. It instead speculates whether police would have eventually discovered the evidence; conversely, the attenuation doctrine “grant[s] establishment of the primary illegality,”<sup>10</sup> but inquires whether the subsequently obtained evidence has, in fact, been tainted by that illegality. In other words, attenuation is focused on whether the evidence is, in fact, tainted; whereas, inevitable discovery is unconcerned with tainted evidence if law enforcement would have eventually and lawfully found the evidence. Also unlike the inevitable discovery doctrine, the attenuation doctrine complies with article I, section 7’s “authority of law” requirement because it considers whether time has passed and circumstances have intervened such that the evidence is procured by an *independent* act of a free will. *Eserjose*, 171 Wn.2d at 927.

Therefore, the attenuation doctrine is more akin to the independent source doctrine, which has been accepted as consistent with article I, section 7, than it is to the inevitable discovery doctrine, which has not.

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<sup>10</sup> *Wong Sun*, 371 U.S. at 488.

4. A plurality of this Court has recognized that the federal attenuation doctrine does not conflict with article I, section 7.

Although it has been employed by Washington courts for decades,<sup>11</sup> the federal attenuation doctrine was first endorsed by a plurality of this Court in 2011. In *Eserjose*, the defendant was illegally arrested in his home. 171 Wn.2d at 911. Later, while still in custody, he confessed to a burglary. *Id.* The defendant argued that his confession should have been suppressed because it was obtained as a result of the illegal arrest. *Id.* at 912. On appeal, the defendant conceded that his confession was admissible under the federal exclusionary rule, but argued that it violated article I, section 7. *Id.* at 913.

A plurality of this Court observed:

While we have expressed the exclusionary prohibition in broad terms, our cases do not stand for the proposition that the exclusionary rule under article I, section 7 operates on a “but for” basis. Rather, we have consistently adhered to the “fruit of the poisonous tree” doctrine as articulated in *Nardone* and *Wong Sun*...

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<sup>11</sup> See e.g., *State v. Vangen*, 72 Wn.2d 548, 555, 433 P.2d 691 (1967) (“Even though a detention is illegal, if the confession is truly voluntary and the causation factor of the illegal detention is so weak, or has been so attenuated, as not to have been an operative factor in causing or bringing about the confession, then the connection between any illegality of detention and the confession may be found so lacking in force or intensity that the confession would not be the fruit of the detention.’ We think the foregoing quotation fits the present situation with tailor-like exactness.” (internal citation omitted)); see also, *King County v. Primeau*, 98 Wn.2d 321, 336, 654 P.2d 1199 (1982) (Utter, J. concurring in part, dissenting in part) (“If knowledge of the second piece of evidence is obtained from an independent source or after a considerable lapse of time, the causal chain is broken”).

In doing so, we have, at least implicitly adopted the attenuation doctrine, that doctrine being intimately related to the “fruit of the poisonous tree” doctrine.

In fact, the “fruit of the poisonous tree” doctrine and the attenuation doctrine stem from the same source. In the very opinion in which he described evidence derived from the “Government’s own wrong” as “fruit of the poisonous tree,” Justice Felix Frankfurter said, “Sophisticated argument may prove a causal connection,” but “[a]s a matter of good sense, ... such connection may have become so attenuated as to dissipate the taint.”

*Eserjose*, 171 Wn.2d at 919-20 (internal citations omitted) (alterations in original). Continuing its analysis, the Court also stated:

When a court determines that evidence is not the “fruit of the poisonous tree,” *a defendant’s privacy rights are respected*, the deterrent value of suppressing the evidence is minimal, and the dignity of the judiciary is not offended by its admission. An alternative “but-for” principle would make it virtually impossible to rehabilitate an investigation once misconduct has occurred, granting suspected criminals immunity unless, by chance, other law enforcement officers initiate an independent investigation.

*Id.* at 922 (emphasis added). Having concluded that the attenuation doctrine is consistent with article I, section 7, the court turned to the facts before it and concluded:

Eserjose’s confession was obtained with the requisite “authority of law,” the deputies having legal authority based on probable cause developed independently of the illegal arrest to keep Eserjose in custody and to question him about the burglary.

*Id.* at 926. Thus, the plurality in *Eserjose* engaged in attenuation analysis, followed by an inquiry as to whether there was “authority of law” under article I, section 7 to obtain the defendant’s confession. This ensured that

not only was the defendant's confession sufficiently attenuated from the illegal arrest, but also that the confession was constitutionally obtained under our state law.

5. Misapplication of the attenuation doctrine in Washington State may run afoul of article I, section 7.

In practice, even federal courts have struggled with correctly applying the federal attenuation analysis, discussed above. LaFave, 6 *Search and Seizure* § 11.4(a) at 328. Under Fourth Amendment attenuation analysis, it is critical that:

[C]ourts wrestling with “fruit of the poisonous tree” issues keep the fundamental notion [that at some point the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost] for when it is lost sight of the results can be most unfortunate.

*Id.* at 327.

The same is true of Washington courts. If Washington's trial courts lose sight of the fundamental justifications for Washington's exclusionary rule, then the outcome of any resulting attenuation analysis will be flawed. Because Washington's exclusionary rule's paramount concern is protecting an individual's right to privacy, Washington's attenuation doctrine must also focus on those privacy rights. Trial courts in Washington must, therefore, ensure that if evidence is tainted by an illegality, or is procured

by law enforcement through an exploitation of an illegality, such evidence is suppressed.

That is not to say, however, that our exclusionary rule should be gratuitously applied, and “no more [evidence] should be swallowed than is needed”<sup>12</sup> to vindicate personal privacy rights. Rather, where the State demonstrates that evidence is procured, not by an exploitation of an illegality, but rather as an independent act of a free will, i.e., it is not a fruit of the illegality, or has been cleansed of the illegality, then a defendant’s privacy rights are both respected and protected. *Eserjose*, 171 Wn.2d at 922. Correct application of the doctrine in Washington protects privacy rights by excluding unlawfully obtained evidence, maintains the integrity of the judiciary, deters unlawful police conduct, and still recognizes that some evidence may be so attenuated from the article 1, section 7 violation that it is untainted.

**C. THE *FERRIER* WARNINGS GIVEN TO MAYFIELD BEFORE HIS VEHICLE WAS SEARCHED ENSURED THE DEFENDANT’S CONSENT WAS AN “INDEPENDENT ACT OF A FREE WILL.”**

In *Ferrier*, this Court held that the unavoidable, inherently coercive effects of a “knock and talk” procedure at a person’s residence are mitigated

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<sup>12</sup> LaFave, 6 *Search and Seizure*, § 11.4(a) at 327 (quoting Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U.Pa.L.Rev, 378, 389 (1964)).

by the requirement that officers advise home-dwellers of their right to refuse, limit, or revoke consent to search. 136 Wn.2d 103. This holding, the Court reasoned, both provided heightened protections under article 1, section 7 of the Washington constitution and assured that a person’s consent to search is truly voluntary. *Id.* Acknowledging that a “knock and talk” “need not be supported by probable cause or even reasonable suspicion,” this Court held that a person must be allowed to make an informed decision whether to allow police to enter a home – that informed decision requires the occupant to be advised “prior to [law enforcement] entering the home ... that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home.” *Id.* at 118. This Court has repeatedly declined to extend *Ferrier* to other contexts, and it has never been held to apply to consent searches of motor vehicles.<sup>13</sup>

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<sup>13</sup> *See, State v. Witherrite*, 184 Wn. App. 859, 861, 339 P.3d 992 (2014) (commenting that this Court has declined to extend *Ferrier*, holding, “[w]hile it is undoubtedly best practice to give the full *Ferrier* warnings before any consent search [of a vehicle] in order to foreclose arguments such as this one, nothing in our constitution requires those warnings other than the “knock and talk” situation), *review denied*, 182 Wn.2d 1026 (April 29, 2015); *and see also, State v. Khounvichai*, 149 Wn.2d 557, 69 P.3d 862 (2003); *State v. Williams*, 142 Wn.2d 17, 27-28, 11 P.3d 714 (2000); *Bustamante-Davila*, 138 Wn.2d 964.

Because the fundamental premise of *Ferrier* is true – that providing explicit, prophylactic warnings before consent is obtained to enter the most private areas of a person’s home ensures that an individual’s article I, section 7 right to privacy is protected – then the same must be true of a vehicle, where there is a lesser expectation of privacy. Because, as *Ferrier* held, the coercive effects of even a *suspicionless* request to search by law enforcement are mitigated by such warnings, and *Ferrier*-warned consent is made as an informed decision, then it follows that such an act is one provided by “an independent act of free will.” This is the fundamental inquiry involved in attenuation analysis – whether the evidence was procured by an “independent act of a free will.”

Here, because law enforcement provided Mayfield with an advice of his right to refuse consent to search under *Ferrier*, a product of article I, section 7 jurisprudence, not Fourth Amendment jurisprudence, this Court may be assured that Mayfield’s privacy interest in his vehicle, under article I, section 7, was prophylactically protected prior to the search. The giving of *Ferrier* warnings prior to a consent search, also ensures that the consent given thereafter is the product of valid “authority of law”<sup>14</sup> required under article I, section 7. By informing Mayfield of his *Ferrier* rights,

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<sup>14</sup> Valid consent is an exception to article I, section 7’s warrant requirement. *See, e.g., Ladson*, 138 Wn.2d at 349.

Nunes did not exploit any preceding illegality – he provided Mayfield an opportunity to make a voluntary, informed decision. Had the defendant declined consent to the search, the search would not have occurred. However, because Mayfield gave *Ferrier*-warned consent, the subsequent search of his vehicle was cleansed of any taint from the prior illegality.

That is not to suggest that *Ferrier* warnings will *always* attenuate a subsequent search from a prior illegality – this inquiry must still be evaluated on a case-by-case basis. *See Brown*, 422 U.S. 590 (prophylactic *Miranda* warnings, alone, are not presumed to remedy earlier Fourth Amendment violation; such a question must be answered on a case-by-case basis). A defendant’s will to refuse consent to search *may* be overborne by the circumstances involved in the preceding illegal seizure such that even *Ferrier* warnings cannot attenuate the consent from the illegality. However, no such circumstances are present here – Officer Nunes did not place Mayfield under arrest during the search, he was not placed in a patrol car, his money and identification were not held by law enforcement conditioned on his compliance with the search, and he was permitted to stand by his vehicle to revoke or limit his consent at any time.<sup>15</sup>

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<sup>15</sup> As also determined by both the trial court and the Court of Appeals, the third attenuation factor, the flagrancy of the official misconduct, also weighed against suppression, as the seizure resulted from a legitimate

In this case, the State has never disputed that there was a violation of the defendant's right to privacy, in that the original purpose of his detention, to investigate the vehicle trespass, exceeded its permissible scope, morphing into a narcotics investigation without reasonable suspicion. However, the remedy<sup>16</sup> for the article I, section 7 violation here does not lie in the suppression of the evidence found in Mayfield's vehicle after informed, *Ferrier* consent was obtained, absent a showing that the defendant's *Ferrier* consent was invalid. Rather, if article I, section 7 commands "immediate application of the exclusionary rule whenever an individual's right to privacy is unreasonably invaded,"<sup>17</sup> then the remedy must be in the suppression of the fruits of the detention *before* Mayfield was advised of his *Ferrier* rights and gave his voluntary, informed consent to search his vehicle.<sup>18</sup> That would include the money found on his person,

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contact with Mayfield during which Nunes attempted to determine why he had abandoned his vehicle on another's property.

<sup>16</sup> Article I, section 7 "requires an exclusionary rule that provides a remedy" for privacy violations. *Ibarra-Cisneros*, 172 Wn.2d at 890 (Madsen, J. dissenting).

<sup>17</sup> *White*, 97 Wn.2d at 111-12.

<sup>18</sup> This is a flaw of the trial court and Court of Appeals' opinions. Perhaps attributable to the defendant's failure to properly raise or argue the issue, neither the trial court nor the Court of Appeals considered that there were two *distinct* searches – one of the defendant's person, without *Ferrier* warnings, and one of the defendant's vehicle, with *Ferrier* warnings. Both courts treated the *Ferrier* warnings as curing any illegality that preceded those warnings, apparently including the search of the defendant's person.

which was used to support his conviction for possession of methamphetamine with intent to deliver. It does not require, however, that the fruits of the vehicle search, based on the defendant's informed *Ferrier*-consent, also be suppressed.

*Armenta*, 134 Wn.2d 1, *State v. Soto-Garcia*, 68 Wn. App. 20, 841 P.2d 1271 (1992), and *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009), each involved similar facts to those presented here, but the consent given was not procured after *Ferrier* warnings were given to those defendants. And, in each case, the court determined that the consent was tainted by the prior illegality.<sup>19</sup> Although voluntary, the consent given by

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Although the record indicates that Nunes informed Mayfield of his right to refuse consent to search his person, it does not indicate that full *Ferrier* warnings were provided. The State does not suggest that the permissible *Ferrier*-advised consent search of the defendant's vehicle remedies the any earlier article I, section 7 violation that may have occurred when the officer obtained the defendant's consent to search his person. The trial court should have analyzed both searches separately – whether the illegal detention tainted Mayfield's consent to search his person, and whether the illegal detention and search of his person (if illegal) vitiated his *Ferrier*-warned consent to search his vehicle.

<sup>19</sup> “Because [] consent to the search was obtained through the exploitation of a prior illegal seizure, suppression of the evidence is required.” *Harrington*, 167 Wn.2d at 670.

In applying the federal attenuation doctrine to the consent search of *Armenta*'s vehicle and his subsequent statements, this Court determined that, even under Fourth Amendment jurisprudence, “[i]n our view, *Armenta*'s consent, although voluntary, was tainted by the prior illegal detention.” *Armenta*, 134 Wn.2d at 17.

those defendants was not prophylactically protected by *Ferrier*. Where, as here, full *Ferrier* warnings are read to a suspect, informing the suspect that he need not consent to a search, or may limit or revoke consent to search, the suspect is given a meaningful choice whether to consent to that search. Because Mayfield made that choice after *Ferrier* warnings were read, and because the facts of the case do not indicate that the consent was anything but voluntary, that consent was not vitiated by the prior illegal detention.

#### IV. CONCLUSION

Where a party fails to provide adequate *Gunwall* briefing explaining why the court should resort to independent state constitutional analysis for a novel issue, the court may decline review.

The attenuation doctrine does not inherently conflict with article I, section 7. Proper application of the doctrine in Washington State respects a defendant's privacy rights because the doctrine recognizes that not all subsequently discovered evidence necessarily derives from a preceding illegality – time, circumstances, and prophylactic measures may cleanse or dissipate the taint. *Ferrier*, like *Miranda*, is a compelling prophylactic

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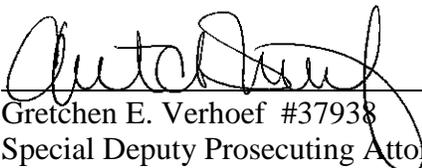
In *Soto-Garcia*, Division Two determined in applying federal attenuation doctrine that, notwithstanding defendant's voluntary consent to search his vehicle, that consent was invalid because it was obtained through exploitation of a prior illegality. *Soto-Garcia*, 68 Wn. App. at 27.

factor which should be considered in determining whether evidence is attenuated from a prior illegality.

However, the case should be remanded for the trial court to make specific findings with regard to the separate search of defendant's person, and whether the consent the defendant gave to search his person was vitiated by the illegal detention. The evidence found on Mayfield's person, prior to the advisement of his *Ferrier* rights should be suppressed if the trial court finds that his consent to search his person was not an independent act of a free will. Contrarily, the search of Mayfield's vehicle was based upon an independent act of a free will, because the defendant was fully advised of his ability to refuse, revoke, or limit the scope of the search and did not do so, and no other circumstances exist which would indicate his will to voluntarily consent was overborne.

Dated this 10 day of September, 2018.

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN MAYFIELD,

Appellant.

NO. 95632-4

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington, that on September 10, 2018, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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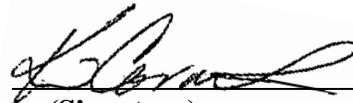
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9/10/2018

(Date)

Spokane, WA

(Place)



(Signature)

# SPOKANE COUNTY PROSECUTOR

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